No. 86-1652

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

LIQUID TRANSPORTERS, INC. - - Appellant

versus

REVENUE CABINET, COMMONWEALTH OF KENTUCKY - - - Appellee

On Appeal from the Court of Appeals of Kentucky

APPELLANT'S REPLY BRIEF

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ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

APPELLANT'S REPLY BRIEF

I. This Case Was Not Decided, and Could Not Have Been Decided, on a Non-Federal Basis.

The decision of the Kentucky Court of Appeals from which this appeal is taken was based on the Court's holding that Kentucky's income tax apportionment method for trucking companies is not void under either the Commerce Clause or the Due Process Clause. *Liquid Transporters, Inc.* v. *Revenue Cabinet,* 721 S. W. 2d 722, 724 (Ky. App. 1986); Jurisdictional Statement, Appendix A, at p. 4a. The decision from which this appeal is taken clearly was not decided on a non-federal basis.

The Revenue Cabinet argues that this case could have been decided on an "adequate, non-federal basis"

and, therefore, this appeal should be dismissed, or the decision below affirmed, under this Court's decision in *Jean* v. *Nelson,* 472 U. S. 846 (1985). See Motion to Dismiss or Affirm, p. 6.

The Revenue Cabinet argues that the Court of Appeals' decision could have been based on the alleged failure of Liquid Transporters[1] to take advantage of "procedural relief" granted by the Kentucky statute providing that a taxpayer "may petition"[2] for an alternate allocation and apportionment method, KRS 141.120(9); Jurisdictional Statement, Appendix F, at p. 30a.

This Court has stated that the question of the existence of a waiver of a federally guaranteed constitutional right is, itself, a federal question, controlled by federal law. This Court has stated it has a duty to make an independent examination of the evidence and the record to confirm that there has been the intentional relinquishment or abandonment of a known right or privilege required for such a waiver. *Brook-*

[1]This corporate appellant's compliance with the requirements of Rule 28.1 is contained on page 1 of the Jurisdictional Statement.

[2]The statute does not state that a decision not to petition will result in the loss of any rights. The Revenue Cabinet has never promulgated any regulations stating that any failure to petition under the statute will result in the loss of any rights, or otherwise dealing with the statute in any way. *Compare* KRS 131.110 and *International Society for Krishna Consciousness, Inc.* v. *Commonwealth,* 610 S. W. 2d 910 (Ky. App. 1980), in which the Kentucky Court of Appeals held that a failure to petition a state tax assessment under a statute stating the assessment would become final if a timely petition were not filed did *not* result in a waiver of rights under the United States Constitution.

hart v. *Janis*, 384 U. S. 1, 4 (1966). See also *Brewer* v. *Williams*, 430 U. S. 387, 403-404 (1977).[3]

This case thus could not have been decided on an "adequate, non-federal basis."

This Court held in the only case cited by the Revenue Cabinet on this issue, *Jean* v. *Nelson, supra,* that if a denial of rights *both* under a federal statute and related regulations *and* under the United States Constitution is alleged, it is not necessary or appropriate for courts below to reach the constitutional issues if a violation of the statute and regulations is or may be found. All courts are to avoid constitutional adjudication except where necessary.

Jean did not involve the alleged waiver of federal constitutional rights — itself a federal constitutional question.

The Revenue Cabinet incorrectly states at page 5 of its motion:

> The [Kentucky] Board [of Tax Appeals] correctly ruled from the evidence before it that Liquid Transporters had waived its right to use an alternate formula as it had failed to properly petition the Revenue Cabinet for a modification of the formula.

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[3]The filing of tax returns using an apportionment method clearly described thereon can hardly be characterized as an intentional relinquishment of the right to use that method. This Court will not presume acquiescence in the loss of property rights guaranteed by the United States Constitution. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307 (1937).

In fact, the Board stated in its Opinion entered April 9, 1984 (Jurisdictional Statement, Appendix D, at p. 18a) that "the Board does not agree that [Liquid Transporters] waived its right to question the application of the three-factor formula."

The Board stated in its Findings of Fact and Conclusions of Law entered July 25, 1984 (Jurisdictional Statement, Appendix D, at p. 21a) that, in its view, Liquid Transporters made no petition for the use of an alternate method during the years at issue. But it did not state either as a finding of fact or a conclusion of law that the failure to petition during those years constituted a waiver. Such a statement would, of course, have been in direct contradiction to the Board's own Opinion.

Thus, the finder of fact in this case refused to find a waiver. Whether the existence of a waiver is deemed an issue of fact or of law, this Court has stated that it is a federal question, controlled by federal law and appropriate for this Court's review. *Brookhart* v. *Janis, supra.*

Even if the Kentucky Court of Appeals had decided this case against Liquid Transporters on the waiver issue (which it did not) that decision would be appealable to this Court as a substantial federal question.

Were the standard otherwise, States could deny citizens their federal constitutional rights simply by asserting that they had waived those rights, thereby precluding review by this Court.

II. This Case Presents Substantial Federal Questions Not Previously Decided by This Court.

This Court has never determined whether Kentucky's three-factor apportionment formula for trucking companies satisfies the Due Process Clause and the Commerce Clause.

The Revenue Cabinet's motion does not dispute, and indeed cannot dispute, the unique character of Kentucky's formula. It's argument, stated directly, is that *any* three-factor apportionment formula somehow based on property, payroll, and sales, *must* satisfy the United States Constitution. If this Court allows that argument to prevail, then no interstate corporation's property is safe.

The Revenue Cabinet repeats at pages 3 and 8 of its motion the misstatement that Liquid Transporters is contending that the "uniqueness" of Kentucky's formula "makes it" violative of the United States Constitution and Kentucky "must use the single factor of mileage to apportion income."

We do not deny the substantial discretion the States have to select apportionment methods. The United States Constitution prohibits, however, the use of apportionment factors in a patently arbitrary and irrational manner, inevitably leading to double taxation and the subjection of the taxpayer to the power of the various States to levy their respective taxes on the multiples of the taxpayer's net income shown here.

To tax more than twice the income that may be taxed under an apportionment formula this Court has

found unquestionably fair is to go too far. *Central Greyhound Lines, Inc. of New York* v. *Carroll E. Mealey,* 334 U. S. 653, 663 (1947).

To arbitrarily eliminate from a property factor all the taxpayer's property outside the taxing jurisdiction and assign to the taxing State in a payroll factor all of the wages for work outside the taxing jurisdiction is to violate that reasonable sense of how income is generated that results in the "external consistency" this Court has required. *Container Corporation of America* v. *Franchise Tax Board,* 463 U. S. 159, 169 (1983).

Every State other than Kentucky has the power under the United States Constitution to tax a portion of Liquid Transporters' net income equal to the mileage driven in that State. Safe in that knowledge, most other States actually use that method. Sixty-three percent of this taxpayer's net income is subject to tax by States other than Kentucky.

Kentucky's attempt to tax 79 percent of the net income of Liquid Transporters violates the United States Constitution.

CONCLUSION

For these reasons, this Court should overrule the Revenue Cabinet's motion and note probable jurisdiction of the appeal.

Respectfully submitted,

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